



Iowa Code Chapter 21, 22, and 305 Comments and Recommendations for the Freedom of Information, Open meetings, and Public Records Legislative Interim Study Committee

The following issues are based on experience with Iowa's Open Meetings and Open Records laws and State Archives and Records Act and research on similar laws in other states and at the federal level.

Updating the Requirement to "Tape Record" Closed Meetings

It is desirable to designate "electronic recording" without reference to the specific technology used to make the recording. Any number of organizations are using digital recorders in public and private meetings and storing the meeting recordings in electronic files (i.e. WAV, .WMA - Windows Media Audio, or MP3). These electronic formats can be electronically secured or encrypted to protect confidential information and they can be played back on a wide variety of readily available devices and software programs. "Tape" recorders are becoming increasingly hard to find. The State of Colorado uses the following language:

"Discussion in an executive session of a state or local public body shall be recorded in the same manner and media that the body uses to record minutes of open meetings. An electronic recording satisfies the requirement. See *Gumina v. City of Sterling*, 2004 WL 3015806 (Colo. App. 2004)."¹

The Illinois Code states: "The Act requires that public bodies keep a verbatim record of all their closed meetings in the form of an audio or video recording. 5 ILCS 120/2.06(a). However, this record generally is not open for public inspection. 5 ILCS 120/2.06(e)."²

Documents Distributed in Meetings

Iowa Code Chapter 21 addresses the requirement for "minutes" taken in meetings; however it does not appear to address the meeting handouts and other material used in meetings. You may want to consider something similar to the following provision of California law:

" . . . any writings or documents distributed to members of the state or legislative body during a meeting shall be made available for public inspection at the meeting if prepared by the state or legislative body, or after the meeting if prepared by some other person. Cal. Gov't Code §§ 11125.1(b) (Bagley-Keene Act); 54957.5(b) (Brown Act)."³

Maintaining the Distinction Between Public Records and Value-Added Services

Currently, Iowa Code Section 8A.201(6) defines "Value-added Services" as follows:

"*Value-added services*" means services that offer or provide unique, special, or enhanced value, benefits, or features to the customer or user including, but not limited to, services in which

^{1, 2, 3} Reporters Committee for Freedom of the Press. (2007). The Open Government Guide. <http://www.rcfp.org/ogg/index.php>

information technology is specially designed, modified, or adapted to meet the special or requested needs of the user or customer; services involving the delivery, provision, or transmission of information or data that require or involve additional processing, formatting, enhancement, compilation or security; services that provide the customer or user with enhanced accessibility, security or convenience; research and development services; and services that are provided to support technological or statutory requirements imposed on participating agencies and other governmental entities, businesses, and the public.

Iowa Code section 22.3A(2) currently permits government bodies to “provide, restrict, or prohibit access to data processing software developed by the government body . . .” and requires government bodies to “establish policies and procedures to provide access to public records which are combined with its data processing software.” Subsequent paragraphs go on to specify how to establish charges for access to electronic public records and data processing software. For constituents and governmental entities to determine the fees to be assessed for records obtained in electronic format, it is important to distinguish between those that are requests for “public records” and those that are considered “Value-added Services”.

In Iowa, all “convenience” fees associated with *Value-Added Services* are set using a public process that provides for input from all interested parties. Proposed convenience fees for *Value-Added Services* are submitted by the requesting agency to the IOWAccess Advisory Council. If the council agrees that the proposed fee is reasonable and appropriate, the proposal is sent to the Technology Governance Board for review and final approval. The Technology Governance Board reports all approved *Value-Added Service* fees to the Department of Management.

Alaska’s Open Records law designates “Electronic Services and Products” and provides for the establishment of special fees for such services and products. The fee for merely duplicating a public record (in electronic form) kept by a public agency may not exceed the actual incremental costs of the public agency. Fees charged for access to “electronic services and products” are based on recovery of the actual incremental costs of providing the electronic services and products, and a reasonable portion of the cost associated with building and maintaining the information system of the public agency. Rate guidelines are established for such services. The term “electronic services and products” is defined in the Alaska statute to mean computer-related services and products provided by a public agency, including:

- (A) Electronic manipulation of the data contained in public records in order to tailor the data to the person’s request or to develop a product that meets the person’s requests;
- (B) Duplicating public records in alternative formats not used by a public agency, providing periodic updates of an electronic file or data base, or duplicating an electronic file or data base from a geographic information system;
- (C) Providing online access to an electronic file or database;
- (D) Providing information that cannot be retrieved or generated by the existing computer programs of the public agency;
- (E) Providing functional electronic access to the information system of the public agency; in this subparagraph, “functional access” includes the capability for alphanumeric query and printing, graphic query and plotting, non-graphic data input and analysis, and graphic data input and analysis;
- (F) Providing software developed by a public agency or developed by a private contractor for a public agency;
- (G) Generating maps or other standard or customized products from an electronic geographic system.

This designation was made in Alaska to: a) delineate the difference between fees charged for access to public records and fees charged for specialized or packaged services; and b) establish a funding mechanism for specialized information systems that provide utility and convenience to targeted constituencies.

Promoting Efficiency and Simplifying Access to Public Records

Within the Iowa Code Section 22.1(2) definition of *Lawful Custodian*, it states, “Each government body shall delegate to particular officials or employees of that government body the responsibility for implementing the requirements of this chapter and shall publicly announce the particular officials or employees to whom responsibility for implementing the requirements of this chapter has been delegated.”

The January 2002 Attorney General’s Sunshine Advisory refers to these employees as “Public Records Contact Persons”. It goes on to say that the Public Records Contact Persons are responsible for managing public records requests in order to:

- Facilitate prompt and lawful response to public records requests.
- Provide a point person in a public office to whom other employees can turn.
- Assure consistent responses and preserves resources.
- Enable certain employees to develop expertise, which they can use to design strategies for organizing public records for optimal access.
- Simplifies for the public the process of seeking public records.
- Better protects the integrity of records which must be kept confidential.

These are important considerations, particularly as they apply to “strategies for organizing public records for optimal access.” Such strategies must take a number of legal, public policy, and funding issues into consideration. Ultimately, they will be determined by executive direction, legislative oversight, public opinion, and guidance from the courts.

Recommendation to Exempt *Copies of Documents Preserved Only for Convenience of Reference* from the Definition of a Record in Iowa Code Section 305.2(9)

Currently, extra copies of documents maintained by governmental entities in Iowa solely for convenience or reference purposes meet the definition of: a) “record” as defined in Iowa Code section 305.2(9)²; and b) “public record” as defined in Iowa Code section 22.1(3)³. It appears that all such copies would need to be produced in response to a request for records under Chapter 22, providing they meet the requestor’s search criteria. By exempting such copies from the definition of a record, as has been done in the National Archives and Records Act definition of a “record”⁴, it would eliminate the need to furnish such copies in response to Chapter 22 requests and improve the efficiency of complying with requests for records.

² Iowa Definition of “Record” - Iowa Code Section 305.2(9) - “Record” means a document, book, paper, electronic record, photograph, sound recording, or other material, regardless of physical form or characteristics, made, produced, executed, or received pursuant to law in connection with the transaction of official business of state government. “Record” does not include library and museum material made or acquired and preserved solely for reference or exhibition purposes or stocks of publications and unprocessed forms.

³ Iowa Definition of “Public Record” - Iowa Code §22.1(3) - As used in this chapter, “public records” includes all records, documents, tape, or other information, stored or preserved in any medium, of or belonging to this state or any county, city, township, school corporation, political subdivision, nonprofit corporation other than a fair conducting a fair event as provided in chapter 174, whose facilities or indebtedness are supported in whole or in part with property tax revenue and which is licensed to conduct pari-mutuel wagering pursuant to chapter 99D, or tax-supported district in this state, or any branch, department, board, bureau, commission, council, or committee of any of the foregoing. “Public records” also includes all records relating to the investment of public funds including but not limited to investment policies, instructions, trading orders, or contracts, whether in the custody of the public body responsible for the public funds or a fiduciary or other third party.

⁴ National Records and Archives Act - 44 USC 3301. Definition of Records - As used in this chapter, “records” includes all books, papers, maps, photographs, machine readable materials, or other documentary materials, regardless of physical form or characteristics, made or received by an agency of the United States Government under Federal law or in connection with the transaction of public business and preserved or appropriate for preservation by that agency or its legitimate successor as evidence of the organization, functions, policies, decisions, procedures, operations, or other activities of the Government or because of the informational value of data in them. Library and museum material made or acquired and preserved solely for reference or exhibition purposes, extra copies of documents preserved only for convenience of reference, and stocks of publications and of processed documents are not included.

Guidance on Miscellaneous Documents and Document Designations

Additionally, any guidance on the status of the following documents would be appreciated:

- Rough drafts or working drafts designated “for discussion purposes only”.
- Notes to be used in preparing some other documentary material.
- Tapes or notes taken as dictation.
- The handwritten notes of a consultant made during or shortly after consulting engagements on behalf of governmental entities.
- Documents labeled as a "draft" or "notes" or otherwise designated as other than a final copy.

References

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